United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original 76-7348

To be argued by
DEBORAH G. ROTHMAN

UNITED STATES COURT OF APPEALS
For The Second Circuit
No. 76-7348

B

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS,

Defendant-Appellant,

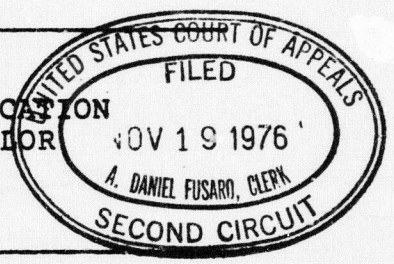
P/S

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK
and the CHANCELLOR OF THE CITY SCHOOL DISTRICT,

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of New York



BRIEF OF THE APPELLEES BOARD OF EDUCATION
OF THE CITY OF NEW YORK AND CHANCELLOR
OF THE CITY SCHOOL DISTRICT

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Appellee Board
of Education & Chancellor,
Municipal Building,
New York, N.Y. 10007.
566-2184 or 4337

LEONARD KOERNER,
DEBORAH G. ROTHMAN,
of Counsel.

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BRIEF OF THE APPELLEES BOARD OF EDUCATION OF THE CITY OF NEW YORK AND CHANCELLOR OF THE CITY SCHOOL DISTRICT

STATEMENT

The defendant Board of Examiners appeals from a judgment of the United States District Court for the Southern District of New York (POLLACK, J.), entered on July 7, 1976.

The judgment granted a motion brought by the New York City Board of Education and its Chancellor to modify the supervisory selection and licensing system approved by the District Court on March 25, 1975, and

to permit the defendants to develop a new supervisory selection and licensing system in accordance with their proposed modified plan.

The defendant Board of Examiners also seek to vacate the Final Judgment on Consent entered in the District Court on July 12, 1973, (MANSFIELD, J.) and to overturn the findings of liability in the decision of the District Court reported at 330 F. Supp. 203 (1971), and affirmed by this Court, 458 F. 2d 1167 (1972).*

OPINION BELOW

In its decision, the District Court stated that the:

> "Board of Education is entitled to the proposed modification of the previous plan with the exception that there should be allocated to the Board of Examiners the responsibilities under step 2 of the modification to comply with State law.
>
> The purposes of the 1975 Order and Judgment and the proposed modification are to assure a selection system free from discrimination in the determination of merit and fitness of candidates for school supervisors.

*The Board of Education and the Chancellor of the City School District concur with and join in the arguments set forth in the brief submitted by the plaintiffs, except to the extent that any statements herein may contradict statements in the plaintiffs' brief, and do not concur with plaintiffs' statement concerning defendants' teachers examinations. Accordingly, this brief will not cover the statement of facts, issues, and most of the arguments set forth in plaintiffs' brief, and will consent primarily of a short statement of the position of the Board of Education and Chancellor on this appeal.

The conditions which brought on this protracted litigation should, of course, not be perpetuated by slavish adherence to the methodology contained in the March 1975 Judgment.

There exists a reasonable possibility that those conditions might be embraced in the implementation of the 1975 plan as written. Even if that 1975 Judgment were consensual, and it so appear to be at least hybrid in character, if its underlying objectives are capable of attainment by simpler, more practical means, less susceptible of controversy and unwitting perpetuation of past vices, the law allows the Court in its discretion to order its modification.

However, the state law allocates the function of examining candidates on the Chancellor's criteria to the Board of Examiners. They must be given the responsibility on Step 2. The new plan allocates the administraion if Step 2 as proposed is modified to give responsibility thereon to the Examiners, no legal prejudice injures to the Examiners from the change of the directives of the March 1975 Judgment." (1-C-931a).

POINT I

THE DISCRETION OF THE DISTRICT COURT IN GRANTING THE MOTION OF THE BOARD OF EDUCATION AND THE CHANCELLOR TO MODIFY ITS 1975 ORDER AND PLAN WAS PROPERLY EXERCISED AND SHOULD NOT BE DISTURBED.

(1)

It is well established that appellate courts will not set aside a district court's exercise of discretion in granting a motion under Rule 60(B) of the Federal Rules of Civil Procedure, "unless it is shown that there has been a clear abuse of discretion." Hines v. Seaboard Airline Railroad Company, 341 F 2d 229, 232 (2nd Cir., 1965). See also, 11 Wright and Miller, §2872.

In the instant case, the evidence and testimony presented to the District Court by the Board of Education and the Chancellor supported the District Court's determination that a modification of its 1975 Order and Plan was proper.

The Board of Education's and Chancellor's motion pursuant to Rule 60(B) to modify the District Court's March 1975 Order and Plan was based on their educational judgment that changed circumstances and new facts since the entry of the March 1975 Plan had demonstrated that the original Plan was not likely to achieve the results it was intended to achieve and that it was not responsive to the current needs of the City school system. (1-B-591-a, 1-C-795-a, 1-C-862a).

The purpose of this lawsuit, and of the injunctions issued herein, and of the March 25, 1975 Order and Plan was to insure the development of a non-discriminatory job-related supervisory selection system. (1-a-19a, 1-C-650a-651a).

In lengthy affidavits and exhibits submitted in the District Court, (1-B-581a-607a, 1-C-795a-867a), the Board of Education set forth facts demonstrating that the original plan was complicated, unwieldy and costly; that portions of it have proven to be unworkable; that it is unlikely that it will result in a non-discriminatory and job-related supervisory selection system; and that changes in circumstances since March 1975 required the modification proposed by the Board of Education.

Some of the most significant of the facts which were presented to the District Court are set forth immediately below.

A) INADEQUACY OF THE JOB ANALYSES CONDUCTED PURSUANT TO THE ORIGINAL PLAN.

Under the terms of the original plan, the first step in the implementation of a permanent licensing system required the Board of Education to hire independent consultants, to develop "prototypical job analyses" for three supervisory positions. (1-B-518a)

When the three job analyses were completed, after six months, and at a cost of $36,000 (1-B-592a), the Board of Education, as required by the original Plan, pro-

ceded to consult with various educators and educational groups as to the merits of these analyses. Very strong criticisms as to the validity and usefulness of these analyses were raised by a broad spectrum of the educational community. (1-B-594a-596a) The criticisms, inter alia, noted that the analyses were vague, confusing, expensive, time-consuming, and offered no assurance that tests based upon these job analyses will produce the best type of supervision or that the resulting new examinations would be bias free. (1-B-602a-613a)

It was pointed out in the Court below that "the American Institutes For Research (AIR) Job Analyses .... do not establish a basis for non-discriminatory job-related supervisory examinations. ... An important flaw in the AIR Job Analayses is that they are not relevant to a school system, such as in New York City, which is characterized by rapid change," (1-C-863a), and that "where the goal is to change the system to make it non-discriminatory and reflective of a changing society, job analyses as carried out by AIR at best have little relevance as they focus on the past and have no predictive value." (1-C-862a)

(B) THE FISCAL CRISIS

The motion of the Board of Education and Chancellor to modify the original Plan was made in the midst of the most difficult and unprecedented fiscal crisis ever faced by the City school system,

necessitating a cut in the Board of Education's 1975-1976 annual budget of approximately 300 million dollars. This cut necessitated, inter alia, the elimination of thousands of teaching positions, the shortening of the school day, increase in class sizes, as well as the curtailment and elimination of many vital educational programs. (1-B-596a, 1-C-803a-806a)

Experts at the Board of Education have estimated that the type of testing called for by Phase I of the original Plan, would cost, at minimum, $150 per applicant, and that the type of testing envisaged by Phase I of the modified Plan would cost approximately $25-30 per applicant. (1-B-597a)

The Board of Examiners entire operation is funded by the Board of Education (1-C-987a). It is the Board of Education's responsibility, in a period of such severe fiscal crisis, to insure that its limited funds are not spent on the preparation of a complicated and costly examination Plan, when the evidence indicates that this Plan offers little assurance that it will result in a non-discriminatory job-related supervisory selection system.

(C) PRESENT PERSONNEL REQUIREMENTS IN THE CITY SCHOOL DISTRICT DIFFER FROM THOSE ENVISAGED BY THE ORIGINAL PLAN

The original Plan was based on the assumption that the Board of Education would have a need to hire large numbers of supervisory personnel every

year. Thus, inter alia, the Plan contemplated separate examinations for most of the approximately 44 supervisory titles. (1-B-513a)

Because of the fiscal crisis and declining pupil registers, and school closings, not only is there no present need for any additional supervisors, but there are now approximately 300 supervisors in excess in the City school system, and the Board of Education predicts that its recruitment needs will be minimal for many years to come. (1-B-597a-598a, 1-C-807a-808a)

In view of these factors, it was the Board of Education's judgment thaat it would be inappropriate to squander its limited funds on costly examinations that are not presently needed, and when they are needed, may no longer be relevant as the City school system is presently undergoing a period of rapid and drastic change. (1-C-799a-800a)

The modified plan approved by the District Court does not involve separate complicated examinations for each title, but a flexible system which can easily be adjusted to present and future needs. (1-B-582a 1-C-865a)

(D) STRONG PROBABILITY THAT THE 1975 PLAN WOULD NOT PRODUCE A VALID AND CONSTITUTIONAL SUPERVISORY SELECTION SYSTEM

The modified Plan more effectively implements the goal of creating a non-discriminatory job related supervisory selection system than the original plan, and is more responsive to the rapidly changing con-

ditions in the New York City school system than the original plan. (1-C-862a, 1-C-778a)

The basis for evaluating the modified Plan is how well is can achieve its goal of developing a non-discriminatory and job-related permanent supervisory selection system, not how well it coincides with the interests of the Board of Examiners in expanding their function by involving them in the development of a highly structured examination process.

Dr. Robert Owens stated that (1-C-866a):

> "the Board of Education's modified plan recognizes the current thought that performance evaluation rather than structured examination is a preferable approach to testing competence in supervision. Aside from meeting New York State and City Board of Education experience and training requirements, the basis of any new licensing procedure should be actual performance on the job. The Board of Education's proposed modified plan correctly reflects an understanding that evaluation of performance on the job is a much better method of determining who can do a job well than pre-job tests.
>
> ... The modified plan eliminates the need for the incredibly complex, expensive, and time-consuming testing procedures proposed in Step I of the Original Plan. Moreover, the original Plan offers little probability of producing a constitutional, non-discriminatory job-related system for selecting school supervisors. The modified plan is compatible with the best contemporary performance-based approaches to the problem which is at issue in the instant matter. It is the approach which appears to be most workable, practical, cost-effective, and responsive to the changing environment which characterizes the New York City Schools."

(2)

The Board of Examiners brief, while emphasizing in great detail the limited statutory role of the Board of Examiners, ignores the broad statutory responsibilities of the Board of Education.

As is noted in the plaintiffs' brief submitted herein, (p. 12), the motion below was made pursuant to these broad statutory responsibilities.

It is the Board of Education and not the Board of Examiners, that is required by law to "determine all policies of the city district," i.e., the City School District of the City of New York (§2590-a(1) of the N.Y. Education Law.) It is the Board of Education, and not the Board of Examiners, that is empowered to prepare and to submit to the City the budget for the City School District, (of which the budget of the Board of Examiners is a part), and which is required to prevent the incurrence of liabilities and expenses in excess of the amount available therefor. (§2590-i of N.Y. Education Law). It is the Board of Education, and not the Board of Examiners that is ultimately responsible for the education of children in the City's schools and for the selection and appointment of the teaching and supervisory personnel for those schools. (§2573.10 of N.Y. Education Law). It is the Board of Education and the Chancellor that have the responsibility under state law for determining the education and experience criteria for each job title and

for determining what qualities should be examined by the Board of Examiners and whether and when to ask the Board of Examiners to conduct examinations. (§2573, §2566 of N.Y. Education Law). (1-C-797a-800a)

In view of these very broad statutory responsibilities and duties of the Board of Education, it was the responsibility of the Board of Education to move to modify a supervisory selection system which, in its judgment, was not responsive to the needs of the City, and whose implementation will result in a large expenditure of funds for the promulgation of a Plan which they believe is unworkable and unlikely to produce the best possible supervisors for the educational system.

POINT II

THE DECISION OF THE SUPREME COURT IN WASHINGTON V. DAVIS, ___U.S.___, 96 S. CT. 2040 (1976) DOES NOT REQUIRE REVERSAL OF A 1973 CONSENT DECREE WHERE, ON THE UNDERLYING ISSUE OF RACIAL DISCRIMINATION IN EMPLOYMENT, THE DISTRICT COURT, IN 1971, AFTER REVIEWING LENGTHY AFFIDAVITS AND EXHIBITS AND TAKING ORAL TESTIMONY, FOUND THAT THE CHALLENGED EXAMINATIONS DISCRIMINATED AGAINST BLACKS AND PUERTO RICANS, AND AFTER THE DISTRICT COURT'S DETERMINATION WAS UPHELD BY THE COURT OF APPEALS, THE BOARD OF EDUCATION BEGAN HIRING SUPERVISORY PERSONNEL PURSUANT TO NEW EXAMINATION PROCEDURES, WHICH PROCEDURES HAVE CONTINUED UP TO THE PRESENT TIME.

(1)

In Washington v. Davis, ___, U.S.___, 96 S. Ct. 2040 (1976), unsuccessful black applicants for employment as police officers in the District of Columbia brought a civil rights action under 42 U.S.C. 1983 challenging the hiring and examination procedures. The District Court, noting the absence of any claim of intentional discrimination found that the examination had discriminatory impact on blacks and that the test had not been validated to establish its reliability for measuring subsequent job performance. The District Court then stated that, while that showing sufficed to shift the burden of proof, the petitioners were not entitled to any relief because, among other things, the test was a useful indicator of training school performance. 96 S. Ct. at p. 2045.

The Court of Appeals reversed and directed summary judgment for the plaintiffs finding that the disproportionate impact on blacks resulting from the examination procedures established a constitutional violation absent any proof by the City that the test adequately measured job performance.

The Supreme Court, in reversing the Court of Appeals and upholding the District Court's dismissal of the complaint, held that disproportionate impact standing alone, does not constitute an equal protection violation, and that a discriminatory purpose, which may be proven by a variety of factual circumstances, must be established. The Supreme Court noted that the constitutional issue in a 1983 action is different from an action brought under Title VII where the plaintiffs may establish a cause of action by only showing the differential racial impact of the challenged hiring or promotion practices. 96 S. Ct. at p. 2047.

The Supreme Court then concluded that the District Court's determination in defendants favor should be upheld. The Court noted that the District Court, after reviewing the evidence, had found that the challenged examination was job related and that such determination was not erroneous. 96 S. Ct. at p. 2053.

Washington v. Davis is distinguishable from the instant case. As noted above, Washington involved only a constitutional challenge to hiring procedures prior to 1972. In the instant case, the order granting a preliminary injunction enjoining the defendants from conducting fur-

ther examinations and making appointments to supervisory positions was issued in 1971. That order was affirmed by the Court of Appeals in 1972. After the unsuccessful appeal, the District Court approved new procedures for the selection of supervisors in the New York City School System. These procedures are being used at the present time, and the Plan approved by the District Court incorporated many of these procedures.

Title VII was made applicable to municipalities in 1972, during the pendency of this lawsuit. The plaintiffs herein could then have amended the complaint to add a Title VII cause of action. There was no reason to do so only because, in 1972, all the parties had agreed to comply with the new procedures for the selection of supervisors, which procedures were approved by the District Court.

As we noted above, the Supreme Court in Washington refused to substitute its judgment for that of the District Court which had determined that the examination was job related. In the instant case, the District Court, after reviewing all the evidence, determined that the challenged examinations bore no rational relationship to any legitimate state purpose. 330 F. Supp. 220. This finding was confirmed by this Court which held that the challenged examinations could not be justified under any equal protection test. 458 F. 2d 1167, 1177 (2d Cir., 1972). These determinations are not clearly erroneous.

(2)

Even if Washington v. Davis was relevant to the initial findings in the instant case, this Court should not disturb the underlying findings of liability herein or the 1973 Final Consent judgment.

Since the entry of the 1973 Final Consent Judgment, the Board of Education has been licensing supervisory personnel pursuant to new examination procedures, some of which are incorporated in the modified plan approved below.

The 1973 Final Judgment on Consent permanently enjoined defendants from administering the old examination system and established supervisory selection and licensing procedures whereby supervisors would be licensed and appointed on the basis of their on-the-job performance. Over 1100 supervisors have received permanent licenses pursuant to the 1973 Final Consent Judgment (1-C-696a), and the placement and seniority rights of many others have been affected by the Courts' various orders on transfers, excessing and seniority, some of which are presently in the process of being implemented.

A review by this Court of the underlying liability issue, six years after the commencement of the litigation and the finding of liability, five years after the implementation of new hiring procedures, and three years after the promulgation of new licensing procedures, some of which are incorporated in the modified plan, would be inappropriate.

(3)

Even if the Board of Examiners had adequate grounds for moving to vacate the 1971 findings of liability in the decision of the District Court, and the 1973 Consent Judgment entered in the District Court, this Court is not the proper forum for such a motion.

It is well established that, with one possible exception not applicable here, relief under Rule 60(b) of the Federal Rules of Civil Procedure is obtained by making a motion in the Court that rendered the judgment. Bankers Mortgage Company v. United States, 423 F. 2d 73, 78 (5th Cir., 1970), cert. denied, 399 U.S. 927 (1970). See also, 11 Wright and Miller, §2865.

The Board of Examiners' application to vacate the 1971 and 1973 judgments of the District Court must be made, by motion, in the District Court.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED, WITH COSTS.

November 19, 1976.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Board of
Education and Chancellor.

LEONARD KOERNER,
DEBORAH G. ROTHMAN,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

.....being duly sworn, says that on the 19 day of NOV. 1976, he served the annexed BRIEFS upon LEONARD GREENWALD Esq., the attorney for the AMICUS herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 80 - EIGHTH - AVE. in the Borough of MAN H., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
19 day of NOV. 19 7 6

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1788
Commission Expires May 1 19 77

Bruce Garner

Form 323-50M-701067(75) 346

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

Fred Gordon

being duly sworn, says that on the 19 day of NOV 1976
at No. 271 MADISON AVE in the Borough of MAN IT in NEW YORK CITY, he
LEGAL AID SOCIETY
served a copy of the annexed BRIEFS upon ELIZABETH B. DuBois Esq.
the Attorney for the PLAINTIFFS in the within entitled action,
by delivering a copy of the same to a person in charge of said Attorney's office,
and leaving the same with him.

Sworn to before me, this 19 :
day of NOV 1976 :

Fred Gordon

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1756
Commission Expires May 1, 1978

Bruce Garner

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

Fred Gordon

being duly sworn, says that on the 19 day of NOV 1976
at No. 425 Park AVE in the Borough of in NEW YORK CITY, he
KAYE SCHOLER, FIERMAN
served a copy of the annexed BRIEF upon HOWLER & HAYES Esq.
the Attorney for the BOARD OF EXAMINERS in the within entitled action,
by delivering a copy of the same to a person in charge of said Attorney's office,
and leaving the same with him.

Sworn to before me, this 19 :
day of NOV 1976 :

Fred Gordon

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1756
Commission Expires May 1, 1978

Bruce Garner